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8   UNITED STATES DISTRICT COURT

9   SOUTHERN DISTRICT OF CALIFORNIA

10   (HONORABLE THOMAS J. WHELAN)

11 UNITED STATES OF AMERICA,   )   Criminal No. 15CR0174-W
)
12   Plaintiff,   )   Date: April 11, 2016
)   Time: 9:00 a.m.
13 v.   )   Courtroom: 3C
)
14 MARCHELLO DSAUN McCAIN,   )   Notice of Supplemental Citation
)   for *Johnson v. United States* Argument
15   Defendant.   )   Regarding Vagueness and Notice
)
16   )
   To: Laura E. Duffy, United States Attorney, and Caroline P. Han and Shane
17   P. Harrigan, Assistant United States Attorneys.

18   This matter is scheduled for a status and motion hearing on April 11, 2016, at

19 9:00 a.m. McCain has a pending motion to dismiss the allegation that his case

20 "involves international terrorism" because 18 U.S.C. § 1001 limits the definition of

21 terrorism to what Congress has painstakingly defined in 18 U.S.C. § 2331. CR 37-1,

22 p. 5-7. In the alternative, McCain argued that the bare allegation that the case

23 "involved international terrorism" was too vague and standardless to provide

24 constitutionally sufficient notice and cited *United States v. Johnson*, 135 S. Ct. 2551,

25 2556, 192 L. Ed. 2d 569 (2015), the Supreme Court case that voided the Armed Career

26 Criminal Act's residual clause as vague. CR 37-1, p. 9-11.

27   *Valenzuela Gallardo v. Lynch,* 2016 U.S. App. LEXIS 5894 (9th Cir. March

28 30, 2016), relied upon *Johnson* to hold that California Accessory after the Fact

                              1   15cr0174-W

1 offenses (CPC § 32) are too general to allow the conclusion that they all involve

2 'obstruction of justice' as that phrase is used to define aggravated felonies.

3   The Government and dissent assure us that the BIA's new
         interpretation is sufficiently limited because it still requires specific
4   intent. But this does little to answer the question central to our
         constitutional concerns—specific intent to do what? *See United States*
5   *v. Williams*, 553 U.S. 285, 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650
         (2008) ("What renders a statute vague, however, is not the possibility
6   that it will sometimes be difficult to determine whether the
         incriminating fact it establishes has been proved; but rather the
7   indeterminacy of precisely what that fact is." (emphasis added)).
         Though it ostensibly defines the required mens rea—intent to interfere
8   with the "process of justice"—it provides little instruction on the
         equally important actus reus. *Cf. Leal v. Holder*, 771 F.3d 1140, 1146
9   (9th Cir. 2014) ("[B]oth the actus reus and the mens rea must be
         considered in concert to determine whether the behavior they describe
10   is sufficiently culpable." (citation omitted)); *Trung Thanh Hoang v.*
         Holder, 641 F.3d 1157, 1161 (9th Cir. 2011) (*"Espinoza-Gonzalez*
11   'articulated both an actus reus and mens rea element of the generic
         definition of [obstruction of justice] crimes for purposes of
12   §1101(a)(43)(S).'" (alteration in original) (citation omitted)). Specific
         intent does little to accord fair notice when there is no indication of
13   what it is that must be interfered with in order to "obstruct justice."

14 *Valenzuela Gallardo v. Lynch*, No. 12-72326, 2016 U.S. App. LEXIS 5894, at *30-31

15 (9th Cir. Mar. 31, 2016). Because McCain intends on arguing that *Valenzuela*

16 *Gallardo* is controlling precedent, he is citing it to this Court. A copy of *Valenzuela*

17 *Gallardo* is attached to this pleading.

18   Respectfully Submitted,

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     Date: April 4, 2016   S/David J. Zugman
20   David J. Zugman
                                          For McCain
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CERTIFICATE OF SERVICE

2   I the undersigned declare under penalty of perjury, that I am over the age eighteen

3   years and I am not a party to the above-entitled action. I have caused service of

4   Supplemental Citation

5   on the following parties by electronically filing the foregoing with the U.S. District Court for

6   the Southern District of California using its ECF System, which electronically notifies them:

7   Caroline P. Han and Shane P. Harrigan, Assistant United States Attorneys

8   I declare under penalty of perjury that the foregoing is true and correct.

9   Executed on April 4, 2016   S/David Zugman
                                                   DAVID J. ZUGMAN

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